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In The

Supreme Court of the United States

October Term, 1996

DR. FRANK A. UBEL, M.D., and DR. HOWARD ANDERSEN, M.D., each individually and as members of a class of persons similarly situated,

Petitioners,

vs.

STATE OF MINNESOTA, MINNESOTA BOARD OF MEDICAL PRACTICE and MINNESOTA DEPARTMENT OF HUMAN SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Minnesota Legislature violated due process by retroactively imposing a $400 tax on physicians, where (1) the maximum period of retroactivity was just over a year; (2) the tax was imposed to promptly correct a mistake made by the Legislature in imposing the tax in the previous legislative session; (3) the law containing the tax also included a substantial increase in the Medicaid rates paid to physicians; (4) the amount of retroactive tax was modest in light of the group taxed, and would not generally affect a physician's decision to be licensed; and (5) the affected physicians had notice through the legislative process that such a tax might be imposed.

2. Whether, by dividing physicians into two groups by license renewal dates for the purpose of imposing and collecting the physician tax, and where the imposition of the tax on the first group to be billed is determined to be retroactive, the Minnesota law violated the equal protection rights of the first group.

3. Whether the decision of the Minnesota Supreme Court denied the physicians' due process rights where (1) two of the court's seven justices voted to affirm the lower court's judgment holding that, as a matter of state law, a 1992 law allowed the collection of the physician tax and was not retroactive and (2) two other justices held, also as a matter of state law, that the 1992 law did not allow the collection of the tax, but that a 1993 law which did allow it was retroactive, and that such retroactivity was constitutional under the federal constitution.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 547 N.W.2d 366 (Minn. 1996), and is reproduced in the Petitioners' Appendix at A-1.

STATEMENT OF THE CASE

This case involves the constitutionality of the retroactive assessment of a "surcharge," or tax, on the licenses of certain Minnesota physicians.

The physician license surcharge adopted by the Minnesota Legislature in 1992 is a $400 annual tax on all physicians licensed by the State of Minnesota. *See* Minn. Stat. § 147.01, subd. 6 (1992 and Supp. 1993). It is one of a number of health care provider taxes created by the Minnesota Legislature as a means of obtaining federal matching funds for Minnesota's Medicaid program.

Medicaid, known as Medical Assistance (or "MA") in Minnesota, is a cooperative federal-state program established under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u (1994), to provide necessary medical services to certain needy individuals. States which participate in the program must follow federal statutes and regulations in order to receive federal funding. *Atkins v. Rivera*, 477 U.S. 154, 156-57 (1986). Federal matching funds cover approximately 54 percent of Minnesota's expenditures for MA; state funds cover the remaining 46 percent.

In 1991, the Minnesota Legislature created the Medical Care Surcharge Fund which levied taxes on certain types of health care providers to generate increased federal matching funds for state MA expenditures. *See* Minn. Stat. § 256.9657 (Supp. 1991). Under the 1991 law taxes were levied on licensed nursing homes, MA-enrolled hospitals, and MA-enrolled prepaid health plans, but not physicians. *Id.*

Late in 1991, Congress changed the federal law governing provider taxes, requiring that states use a "broad-based and uniform" method of taxing providers and prohibiting a direct payback of the tax to providers. *See* Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, Pub. L. 102-234, 105 Stat. 1793 (codified at 42 U.S.C. § 1396b(w)(1)(A) (1994)). For states which had been utilizing health care provider taxes before November 1991, Congress gave the states until September 30, 1992 to come into compliance with the new law. 42 U.S.C. § 1396b(w)(1)(D)(ii) (1994). In response, the Minnesota Legislature made significant changes to Minnesota's existing health care provider taxes. *See* Act of Apr. 29, 1992, ch. 513, art. 7, §§ 16-21, 133, 1992 Minn. Laws 999-1001, 1085 (codified at Minn. Stat. § 256.9657 (1992)). The Legislature changed some of the formulas for existing taxes and added categories of providers to include non-MA-enrolled providers. *Id.* At the same time, the Legislature adopted the physician surcharge tax. *See* Act of Apr. 29, 1992, ch. 513, art. 7, § 9, 1992 Minn. Laws 995 (codified at Minn. Stat. § 147.01, subd. 6 (1992)). The law became effective October 1, 1992. *Id.*, § 137, 1992 Minn. Laws 1086.

The same 1992 act which imposed the physician tax also increased the MA payment rates for physicians – 25 percent for some services and 15.4 percent for all others. *Id.*, § 131, 1992 Minn. Laws 1084 (codified at Minn. Stat. § 256B.76 (1992)). These increases were effective October 1, 1992. *Id.* Funding for those increases depended in part on collection of the tax from physicians whose licenses were issued or renewed between April 1 and September 30, 1992 and who were licensed on October 1, 1992, the effective date of the law.

For the purpose of collecting the tax, the Legislature divided physicians into two groups – those whose licenses were issued or renewed between April 1 and September 30 and those whose licenses were issued or renewed between October 1 and March 31. In November 1992, Respondents (or "the State") assessed the tax on the first group – licensed physicians whose licenses had been issued or renewed between April and September, 1992. Pet'r App. A-48. Bills were sent out in November 1992 requesting payment by December 15, 1992. *Id.* The State collected the billed amounts and deposited them in the State's general fund as provided in Minn. Stat. § 256.9656 (1992).

Following collection of the tax in December 1992, Petitioners ("the physicians") commenced this action. They alleged that, as a matter of state statutory construction, the 1992 law did not provide for the imposition of the surcharge on physicians whose medical licenses were issued or renewed between April and September, 1992. In addition, they asserted that imposing the surcharge in that way would constitute an impermissibly retroactive application.

While cross-motions for summary judgment were pending, the Legislature learned of the dispute and amended the 1992 physician tax law. The 1993 law, as passed by the Legislature and signed by the Governor on May 27, 1993, contains the following language:

> Sec. 6. Minnesota Statutes 1992, section 147.01, subdivision 6, is amended to read:
>
> Subd. 6. [LICENSE SURCHARGE.] In addition to any fee established under section 214.06, the board shall assess an annual license surcharge of $400 against each physician licensed under this chapter. The surcharge applies to a physician who is licensed as of or after the effective date of this section in Laws 1992, and whose license is issued or renewed on or after April 1, 1992, and is assessed as follows:
>
> (1) a physician whose license is issued or renewed between April 1 and September 30 shall be billed on or before November 15, and the physician must pay the surcharge by December 15; and
>
> (2) a physician whose license is issued or renewed between October 1 and March 31 shall be billed on or before May 15, and the physician must pay the surcharge by June 15.
>
> . . . .
>
> Sec. 129. [LEGISLATIVE INTENT.]
>
> Sections 6 and 15, paragraph (b); and the amendment to paragraph (a), clause (3), in section 123, are intended to clarify, rather than to change, the original intent of the statutes amended.
>
> . . . .

Sec. 135. [EFFECTIVE DATES.]

. . . .

Subd. 7. Sections 6 and 129 are effective the date following final enactment and apply to cases pending or brought on or after their effective date.

Act of May 27, 1993, ch. 1, art. 5, §§ 6, 129, 135, 1993 Minn. Laws, 1st Spec. Sess. 3137, 3253, 3255 (underlining indicates language added by 1993 amendment).

Thus, the Legislature made it clear that it intended that the first group of physicians, the April-September group, was required to pay the tax in December 1992. And the Legislature further stated that the amendment was intended to clarify, not change, the original intent of the 1992 law. Following these amendments, the physicians raised several issues in this suit regarding the constitutionality of the 1993 amendments.

In the district court, the State argued that the purpose of the 1993 amendments was to make clear, to the extent any clarification was necessary, that the Legislature intended the State to collect the surcharge from the first group of physicians in December 1992. On November 29, 1993, the district court rejected the physicians' statutory and constitutional claims and held that the State's application of the 1992 law was proper. Pet'r App. A-28. The trial court held that the State correctly imposed, as the Legislature intended, the physician tax on physicians whose licenses to practice medicine were issued or renewed between April and September 1992, and who were licensed on the effective date of the law. The trial court further held that application of the 1992 law and the clarifying amendment was not a retroactive

operation of the law, and that, as applied, the law was rationally related to a legitimate governmental purpose.

The physicians appealed to the Minnesota Court of Appeals. On June 28, 1994, that court, in an unpublished decision, affirmed the decision of the trial court and held that the State's application of the 1992 physician tax law to the first group of physicians was correct. Pet'r App. A-23. The court of appeals further held the State's application of the law constitutional.

The Minnesota Supreme Court accepted review of the case. On May 9, 1996, the court issued its decision affirming the lower court. The court's judgment upholding the State's action resulted from two separate opinions, by four of the court's seven members. Two justices, Justice Tomljanovich joined by Justice Stringer, agreed with the reasoning asserted by the State and adopted by the court of appeals. They concluded that the 1992 statute was intended to require the first group of physicians to pay the tax as of November 1992, and that such an application of the 1992 law was not retroactive. Pet'r App. A-16-18. They also held that the statute was rationally related to a legitimate state interest. *Id.* at A-19-20.

Two other justices, Justice Coyne joined by Chief Justice Keith, voted to affirm the lower court decision, and the State's collection of the tax, on a different basis. Pet'r App. A-4. They held that collection of the tax from the first group of physicians on October 1, 1992 was not authorized under the 1992 law, and that the 1993 amendment to that law represented a change and not a clarification of the existing statute. *Id.* at A-9-11. Nonetheless, they held that the 1993 law itself was intended, as a

matter of state statutory interpretation, to retroactively require the imposition of the tax on the first group of physicians in November 1992. Pet'r App. A-15. Citing several of this Court's decisions concerning the constitutionality of retroactive taxes, Justices Coyne and Keith held that the retroactive imposition of the surcharge tax in this case did not violate due process. Under the facts of this case, they held, the retroactive tax served a "benign and legitimate purpose." *Id.* at A-16.

In a dissenting opinion authored by Justice Page, three justices concluded that the 1992 law did not apply to the first group of physicians in 1992, and that the 1993 law could not be retroactively applied. Pet'r App. A-20.

The physicians requested rehearing from the state supreme court. The court denied rehearing in an order issued July 29, 1996. Pet'r App. A-22.

The two-justice opinion by Justice Coyne, upholding the State's action in collecting the surcharge tax based on the conclusion that it was not unconstitutional to impose such a tax retroactively in 1993, is the "opinion of the court" which the physicians challenge in their certiorari petition. Thus, for the purpose of this brief only, the State accepts the determination of those two justices that it is the 1993 law which authorized the collection of the tax at issue here, and that such an imposition was retroactive.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for Writ of Certiorari for several reasons. The decision of the Minnesota

Supreme Court does not conflict with any decision of this Court, and the allegedly conflicting cases cited by the physicians are materially different from this case. Nor is this case so important as to warrant this Court's review. The Minnesota Supreme Court made clear in its holding, consistent with this Court's decisions, that the constitutionality of a retroactive tax depends on the fairness and rationality of imposing the tax in the particular circumstances of the case. The court carefully considered the issues in this case, and its holding is narrowly tailored to the specific facts presented here. The circumstances prompting retroactive imposition of this tax on this group of physicians are unlikely to recur.

Finally, the physicians' arguments that the physician tax law violates equal protection and that the Minnesota Supreme Court does not know how to determine which party prevailed in a case are insubstantial. They certainly do not warrant this Court's review.

I. THE MINNESOTA SUPREME COURT'S HOLDING THAT DUE PROCESS DOES NOT PROHIBIT THE IMPOSITION OF A MODEST TAX ON PHYSICIANS FOR A SHORT RETROACTIVE PERIOD UNDER THE CIRCUMSTANCES OF THIS CASE DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The physicians contend that this Court must grant certiorari because the Minnesota Supreme Court's decision conflicts with this Court's prior decisions applying the Due Process Clause. Pet. at 13. Contrary to the physicians' argument, however, the Minnesota Supreme

Court's decision shows that the court carefully considered the prior decisions of this Court regarding the retroactivity of tax statutes, together with the particular facts of this case, in upholding application of the 1993 surcharge amendment to the physicians.

In upholding the tax, the Minnesota court observed:

> Although the retroactive application of a statute creating a new tax was once considered unconstitutional, *e.g., Nichols v. Coolidge*, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184 (1927); *Blodgett v. Holden*, 275 U.S. 142, 48 S. Ct. 105, 72 L. Ed. 206 (1927), today's constitutional impediments to retroactive civil legislation are, as the United States Supreme Court puts it, "now modest." *Landgraf v. USI Film Products*, 511 U.S. 244, ___, 114 S. Ct. 1483, 1501, 128 L. Ed. 2d 229 (1994).

Pet'r App. A-12. The state court concluded that the one-year retroactive imposition of the physician surcharge tax, in response to federal legislation and in light of the simultaneous Medicaid rate increase for physicians, served a "benign and legitimate purpose." Pet'r App. A-16 (quoting *Landgraf*, 114 S. Ct. at 1483). The state court's holding in this case is consistent with prior decisions of this Court.

"This Court repeatedly has upheld retroactive tax legislation against a due process challenge." *United States v. Carlton*, 512 U.S. 26, ___, 114 S. Ct. 2018, 2021 (1994) (citations omitted). The most-often-cited standard for such retroactivity challenges is that stated in *Welch v. Henry*, 305 U.S. 134, 147 (1938):

> In each case it is necessary to consider the nature of the tax and the circumstances in which

> it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

The Court has more recently clarified:

> The "harsh and oppressive" formulation, however, "does not differ from the prohibition against arbitrary and irrational legislation" that applies generally to enactments in the sphere of economic policy. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 733, 104 S. Ct. 2709, 2719-20, 81 L. Ed. 2d 601 (1984). The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation . . . .

Carlton, 114 S. Ct. at 2022. Such a law is constitutional if "'the retroactive application of the legislation is itself justified by a rational legislative purpose.'" *Id.*, quoting from *Pension Benefit*, 467 U.S. at 733.

Considering "the nature of the tax and the circumstances in which it was laid," the decision here that the retroactive imposition of the physician surcharge tax was consistent with due process was an easy one. A number of factors compel this conclusion.

First, it is evident, as the Minnesota Supreme Court found, that the Minnesota Legislature in 1993 intended merely to correct a mistake in the 1992 law. Pet'r App. A-14. The legislative history of the 1992 law shows that the Legislature intended to raise a specified amount of money from the physician tax, which necessarily assumed that the first group of physicians would pay the tax in 1992. *Id.* at A-17-18. When the Legislature learned

that the physicians had challenged this application of the law, the Legislature promptly amended the law, either to clarify its initial intent (as the Legislature asserted and the Tomljanovich opinion concluded) or to correct the drafting mistake (as the Coyne decision concluded).

This Court has found that such a purpose is proper:

> First, Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss. . . . We cannot say that its decision was unreasonable.

Carlton, 114 S. Ct. at 2023. This Court's reasoning in *Carlton* applies equally here.

Second, it is significant that the Legislature "acted promptly and established only a modest period of retroactivity." *Id.* The amendment was accomplished at the very next legislative session and, as in *Carlton*, the retroactive effect extended just over a year. *Id.*

Third, it is significant that, at the same time as the physician tax was intended to be first collected, the Legislature provided for an increase in the rates physicians were paid for providing care to MA patients. It would be unfair if the physicians were allowed to retain this benefit, while avoiding the corresponding obligation to pay the tax. Under such circumstances, the Legislature's decision to retroactively impose the tax was clearly reasonable.

Fourth, the amount of the physician tax, $400, was relatively modest in light of the value of the privilege

involved, the practice of medicine. It would be the rare case where the imposition of such a charge would affect a person's decision to obtain or renew a medical license.

The physicians contend, however, that this Court has never sanctioned the retroactivity of a wholly new tax, and they assert that it is in this respect that the Minnesota Supreme Court's decision diverges from prior decisions of this Court. However, the cases cited by the physicians are, as this Court has observed numerous times, limited to the facts under which they were decided. Both cases relied on by the physicians, *Untermyer v. Anderson*, 276 U.S. 440 (1928), and *Blodgett v. Holden*, 275 U.S. 142 (1927), involved imposition of the gift tax. In both cases, this Court expressed concern about the effect that a wholly new tax would have had on the donor's decision to make a gift and that, if the donor had known of the tax, he might not have made the gift.

However, as this Court recognized in *Welch*, 305 U.S. at 147-48, new and retroactive gift taxes raise unique concerns for due process purposes. The Court recognized that, in the gift tax context, donors make significant financial decisions primarily because of the tax consequences. A new retroactive tax imposed in that context therefore creates a potential unfairness not found in most other situations where taxes are imposed retroactively. This Court in *Welch* acknowledged this, stating: "Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases. Similarly, a tax on the receipt of income is not comparable to a gift tax." *Id.* at 147-48 (citations omitted). Similar reasoning applies here. Obtaining or maintaining licensure as a physician is not an act that is

done for tax purposes, and taxes of the magnitude involved here will not generally affect such decisions.

The physicians argue that they had no notice before October 1, 1992, the effective date of the 1992 law, that there may be any tax on licenses issued or renewed from April through September, 1992. Pet. at 5. However, lack of notice does not prevent retrospective imposition of a tax under the due process clause. *Carlton*, 114 S. Ct. at 2023. Moreover, while the 1992 law's designated effective date was October 1, 1992, it was actually enacted on May 27, 1992, and had been debated in the Legislature for some time before April 1, 1992. Pet'r App. A-35-36. This public legislative consideration of the tax, prior to any claimed retroactive application period, disposes of any claim that notice of the possible tax was inadequate. *See United States v. Darusmont*, 449 U.S. 292, 299 (1981).

The decision of the Minnesota Supreme Court retroactively applying the 1993 surcharge tax amendment to the physicians does not conflict with prior decisions of this Court. There was ample basis to conclude that the law's retroactive application was rationally related to legitimate state interests, and was neither unduly harsh nor oppressive. There is no misapplication of law or important issue to justify review by this Court.

II. REVIEW BY THIS COURT IS NOT REQUIRED TO CONSIDER THE PHYSICIANS' EQUAL PROTECTION CLAIMS.

The physicians also assert that review by this Court is necessary because the Minnesota Supreme Court failed to address their equal protection claims. Pet. at 18. The

physicians argue that retroactively taxing only half the state's physicians is not rationally related to any legitimate state interest.

While the Justice Coyne opinion did not address the physicians' equal protection argument, the Justice Tomljanovich opinion did address it. *See* Pet'r App. A-19-20. The opinion correctly applied rational basis analysis, citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Where no fundamental rights are impinged by a particular statutory scheme, the classification will be upheld "if any reasonably conceivable state of facts [exists] that could provide a rational basis for the classification." *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993).

The "classification" involved here is merely that the challenged law divided physicians into two groups, by licensure or renewal date, for the purpose of assessing and collecting the surcharge tax. The misfortune the physicians complain about here is simply that they were in the first group required to pay the tax. However, their claim that this amounts to a deprivation of equal protection is frivolous. It is well settled that statutes subject to rational-basis review do not violate equal protection merely because they contain less-than-precise classifications:

> [C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.' " "The problems of

> government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific."

Heller v. Doe, 509 U.S. 312, 321 (1993) (citations omitted). The Minnesota Legislature's "classification" was simply a "rough accommodation" to administrative practicalities. Unless the State chose to bill all physicians in one group, some group of physicians had to come first. There is clearly nothing about this issue that deserves this Court's attention.

III. THE MINNESOTA SUPREME COURT DID NOT MISCONSTRUE ITS MAJORITY IN AFFIRMING THE LOWER COURT DECISION.

Lastly, the physicians argue that the Minnesota Supreme Court misconstrued its own opinions as to which was the prevailing side in the case, and that this is a due process violation requiring this Court's review. This argument is wholly meritless and, in any event, raises no legitimate federal question.

The question originally presented to the Minnesota Supreme Court was whether the court of appeals decision should be affirmed. Even though some members of the state supreme court disagree with the State's position regarding the plain language of the 1992 statute and the effect of the clarifying amendments, four of the court's seven justices concluded that the State had a proper legal basis to collect and retain the funds from the physicians, and accordingly agreed that the court of appeals decision should be affirmed.

This was obviously the correct disposition of the case, but in any event it is a matter of state law, not federal. Review by this Court is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

November 1996

Respectfully submitted,

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